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BILLS STILLS & PILLS: DUI UPDATE

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DUI Law Updates & Reminders





Legislative Update




Repealed

SB 1531

- Repealed provision that would have allowed 4 months DOC to be served in county jail for felony DUI.

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Amended A.R.S. § 28-1304



Synthetic Stimulants "Bath Salts"

HB 2356

- Added seven most common varieties of "bath salts" to AZ drug schedule.
- Illegal to possess or drive with in system
- NOTE: Some AZ Crime Labs cannot test for all seven

**Effective date February 16, 2012

Amends A.R.S. § 28-1304




Synthetic Stimulants "Bath Salts"

HB 2356

Butylone, Fluoromethcathinone,
Methoxymethcathinone,
Methylenedioxymethcathinone,
Methylenedioxypyrovalerone,
Methylmethcathinone, &
Naphthylprovalerone

**Effective date February 16, 2012

Amends A.R.S. § 28-1304



DUI Jury Trials

HB 2284

- Reinstated jury trial provision for first offense non-extreme DUIs.

**Effective immediately

Amends A.R.S. § 28-1381



***Sine die was on
May 3rd, 2012 at 8:22 p.m.***



Effective Date - August 2, 2012






**Proof of Insurance
HB 2677**

Allows proof of financial responsibility to
officers via wireless communication devices.

Court may require card.


Display of evidence on device is not consent
to access other contents of device.

**Effective date August 2, 2012

 **Suspended Driver's License**
HB 2286


Allows courts to dismiss charges of driving on suspended license when suspension was based on failure to pay fines & person presents proof that privilege has been reinstated.

**Effective date August 2, 2012 Amends ARS § 28-3474 & 28-3511

 **Statute of limitations; moving violation**
HB 2241

•Created statute of limitations for certain moving violations resulting in death or serious physical injury to "two years after actual discovery...of the offense or discovery...that should have occurred with the exercise of reasonable diligence."

Amends ARS § 13-107 and § 13-107

 **Accidents; Failure to Stop**
SB 1163

Requires revocation of driving privileges in serious injury H & R cases for 5 years & death cases for 10 years.

If there is a non-serious injury, license will still be revoked for 3 years.

**Effective date August 2, 2012 Amends ARS § 28-561



Child Restraint System

HB 2154

Requires each passenger in a motor vehicle between ages of 5 & 8, if not more than four feet nine inches tall, to be restrained in a child restraint system.

***Effective date August 2, 2012*

Amends ARS § 28-907



Vehicle equipment and inspections

HB 2477


Allows implements of husbandry to drive on a highway for travel between farms or to a place of repair, supply or storage.

Amends ARS § 28-921 and § 28-981



Don't Miss This







Victim's rights; criminal offense; interviews


HB 2550

- Peace officers now considered victims even when act occurs in the scope of officer's duties.
- For purposes of victim's rights, "criminal offense" is defined as conduct creating probable cause to believe a felony, misdemeanor, petty offense, or violation of local criminal ordinance has occurred.

Amends ARS § 2-412, §13-4401, and §13-4433.

Prohibition




Hookah use; minors; prohibition

HB 2034

- Creates a petty offense for selling or providing an instrument "solely designed for the smoking or ingestion of tobacco or shisha" including a hookah or water-pipe to a minor: \$100 fine and 30-hours community service for minors possessing such instruments. Exemption for: religious use/possession for use in religious ceremonies; gifts or souvenirs that are not intended to be used.

Amends ARS § 13-3622.

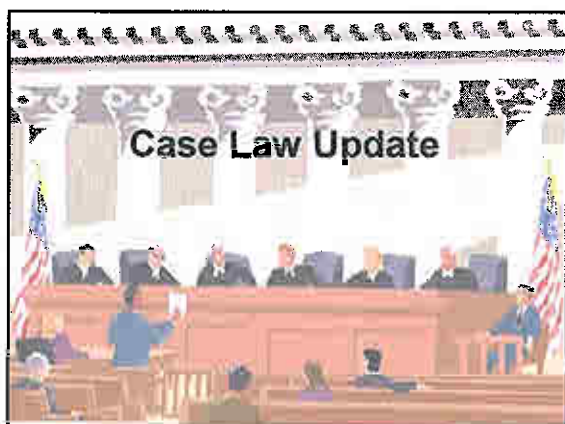


Home detention program

HB 2390

- Changes requirement that defendant "shall" pay for electronic monitoring to court "may" require defendant to pay.
- Removes requirement to work in the same county.

Amends ARS § 8-499.07.



Stop of Vehicle Brake Light

No violation of ARS § 28-939 for vehicle to have brake light at top rear of vehicle not working when other two are.

Officer did not have grounds for stop when didn't observe any other traffic infractions nor articulate any other basis for stop.

State v. Fikes, 228 Ariz. 389 (App. 2011).

Right to Counsel for DUI

DUI defendant denied right to counsel if, asks to speak to attny, police provide phone & phone book but reject request for assistance after it is discovered portion of yellow pages containing attnys' names & numbers was ripped from book.

State v. Penney, 229 Ariz. 32 (App. 2012).

DUI Home Detention

- Court may only order HD if City/County has authorized.
- DUI defendant not eligible for HD unless first serves minimum 20% of sentence in jail.
- If defendant serves HD while appeal is pending, must give credit for time served unless court has issued order staying sentence.

Sheerer v. Munger, (App. 2012)

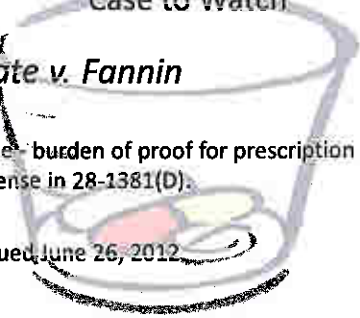
Disclosure of Lab Results

- Court cannot sanction State under Rule 15.7 for failing to disclose uncompleted test results.
- Can sanction under Rule 15.6 ONLY if not disclosed 7 days before trial & court makes specific findings.
- Court should grant extension if properly requested & supported.

State v. Simon, (App. 2012).

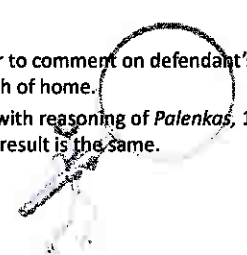
Case to Watch

- ***State v. Fannin***
- Issue: burden of proof for prescription drug defense in 28-1381(D).
- Argued June 26, 2012



Commenting on Refusal to Agree to Search

- It was error to comment on defendant's refusal to allow search of home.
- Disagreed with reasoning of *Palenkas*, 188 Ariz. 201 (1988) but result is the same.

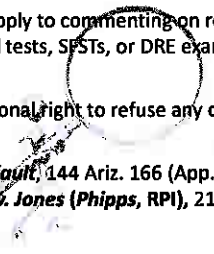


State v. Stevens – 228 Ariz 411 (App. 2012)

State v. Stevens

- Should not apply to commenting on refusals of breath/blood tests, SFSTs, or DRE examinations.
- No constitutional right to refuse any of the above.

State v. Theriault, 144 Ariz. 166 (App. 1984); ***State ex. rel. Verbarg v. Jones (Phipps, RPI)***, 211 Ariz. 413 (App. 2005).



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DRUG RECOGNITION EXPERT

Background / Training

- Officer _____, please introduce yourself to the court and the members of the jury.
- How are you currently employed?
- How long have you worked for the _____ police department?
- What prior law enforcement experience do you have? (Only ask if officer has prior experience.)
- What special training, if any, have you had in the field of detecting and apprehending drivers impaired by alcohol or drugs? [Areas to cover]

_____ Police Academy

_____ Training by Field Training Officer

_____ HGN/SFST School [instructor]

_____ ARIDE [instructor]

_____ College courses

_____ Books and/or studies read

_____ DRE Course [instructor] BE VERY THOROUGH and DETAILED.

_____ Phlebotomy

_____ Intoxilyzer training

_____ Other relevant training – refresher/in-service courses, seminars, etc.

_____ Other relevant experience (EMT, military, etc.)

- Have you ever participated in drinking labs?
- How many times?
- What is the purpose of a drinking lab?
- During these labs, did you have an opportunity to administer field sobriety exercises to people and then compare your opinions regarding their level of impairment to other officers and the subject's actual breath alcohol level?
- Were you able to accurately and reliably discern their level of alcohol impairment i.e. above or below a .08 BAC?
- Have you participated in any programs at the jail where subjects were suspected of having consumed illegal or illicit drugs? Get details

- Approximately how many times have you stopped possibly impaired drivers?
- Do you arrest everyone whom you initially suspect of being impaired?
- Why not?
- How many DUI arrests have you made? [Make sure you know the answer to this question ahead of time]
- When you arrest someone who exhibits signs and symptoms of impairment, do you arrest for any one thing? [No]
- What do base your arrest on? [Totality of the circumstances]

DRE Testimony

Only ask impairment with these questions if the officer is qualified as an expert. Otherwise limit to signs and symptoms of impairment or to determining drug consumption.

- Are you familiar with the national Drug Evaluation and Classification Program (AKA DRE Program)?
- What is it?
- What is the National Highway Traffic and Safety Administration?
- What is the IACP? (International Association of Chiefs' of Police – manages and coordinates the DEC/DRE program. Credentials DREs).
- How is NHTSA involved with the DRE program? [Sponsors the program conducted studies.]
- Have officer describe any relevant studies supporting the program he is aware of.
- Has the DRE protocol been found to be reliable?
- Is the fact that certain drugs cause certain observable signs and symptoms used in the medical field? [yes]
- How does that relate to the DRE protocol (DRE officer follows a standardized protocol, uses his training & knowledge that certain drug categories cause certain observable signs and symptoms, & determines if the subject is under the influence of one of these drug categories (or if the subject has signs & symptoms consistent with these drug categories if your judge will not allow the under the influence language.)

- Are you a certified DRE?
- Who certified you? (Arizona State Coordinator)
- Do they issue you a certification card by the IACP? [You may introduce a copy if you have one]
- When were you certified as a DRE?
- How does a police officer become certified as a DRE? [56 hours of classroom training, 30 – 40 hours of certification training, practical exam, logs, etc.]
- To remain qualified to administer DRE certification, do you maintain DRE logs?
- Please describe that process.
- Using that process have you calculated your accuracy rating using the DRE protocol (only ask if officer has.)
- What is your accuracy rating?
- Please explain to the jury what is involved in DRE training. [SFSTs, pharmacology, drug categories, human physiology, written exam, perform and draft DRE reports in the field under instructor supervision]
- What procedures do DREs use to determine whether or not someone is under the influence of drugs (has taken drugs)? [administers DRE exam] [
- What is a drug influence exam? [SFSTs, medical history (blood pressure, body temperature, pupil size, reaction to light), etc.]
- Is this evaluation standardized and systematic? What does that mean?
- Is the DRE protocol generally accepted to be an accurate and reliable means of identifying drug influence and impairment? (or if someone has taken drugs?) [Yes: US Dept. Of Transportation, ACLU, American Bar Association, International Association of Chiefs of Police, American Optometric Association.]
- How many DRE examinations have you conducted?
- [Approximately how many times have you determined that a DUI suspect was under the influence of drugs?]
- Have you ever confirmed your opinions by taking blood or urine samples?
- [Based on your training and experience, can you accurately and reliably determine whether someone is under the influence of drugs?]

- Based on your training and experience, can you accurately and reliably identify the particular drug category [causing a person's impairment]? [Yes]
- How many DRE drug categories are there? [7]
- How are drugs grouped? [Drugs are grouped according to common or shared effects, known as signs or symptoms]
- What are the seven categories? [CNS depressants, CNS Stimulants, Hallucinogens, Dissociative Anesthetics, Inhalants, Narcotic Analgesics, Cannabis]
- Did you conduct a DRE examination in this case?
- Did you follow your training and education?

DRE Protocol

On ____ date, at approximately ____ time, did you come into contact with someone who later became known to you as ____? (If DRE was not arresting officer and has not already testified to this.)

Do you see that person in the courtroom here today? Have officer identify defendant.

Please relate how you came into contact with the defendant.

What observations did you make at that time?

- Please explain to the jury how a drug influence evaluation is performed?
 - ◊ Breath Test
 - ◊ Interview of Arresting Officer
 - ◊ Preliminary Exam and First Pulse
 - ◊ Eye Exam
 - ◊ Divided Attention Psychophysical Tests
 - ◊ Vital Signs and Second Pulse
 - ◊ Dark Room Examination
 - ◊ Examination of Muscle Tone
 - ◊ Check for Injection Sites and Third Pulse
 - ◊ Suspect's Statements and Other Observations
 - ◊ Opinions of Evaluator
 - ◊ Toxicological Examination

1. BAC

- Officer please describe the first component of the evaluation.
- Was the defendant given a breath test in this case?
- Are you familiar with the defendant's breath test results?
- How?
- What experience do you have in Dui investigations?
- Based on your training was the breath reading consistent with the signs and symptoms of impairment displayed by the defendant?
- If you suspect drugs in an individual why is a breath reading necessary?

2. Interview of Arresting Officer

- Please tell us about the second step of the evaluation.
- Did you interview the arresting officer?
- What did he tell you? [You will probably get an objection for hearsay – it is not for the truth of the matter asserted. It is a portion of the DRE and is part of the information the officer relies on (the basis for his opinion.)]
- Were his observations consistent with the defendant's breath reading?
- Why is it important to interview the arresting officer?

3. Preliminary Exam and First Pulse

- Please describe the third step. [ask series of standardized questions, look at speech, coordination, breath, face]
- What is the purpose of the preliminary exam?
- Did you conduct the preliminary exam on the defendant in this case?
- Did you ask the defendant a series of questions?
- Please tell us what you asked the defendant and what answers he gave.
 - ◊ What time did he indicate it was?
 - ◊ When did he last sleep?
 - ◊ How long did he sleep?

- ◊ Was he sick or injured?
- ◊ Did he indicate that he is a diabetic?
- ◊ An epileptic?
- ◊ That he suffered from allergies?
- ◊ That he was taking insulin?
- ◊ Whether he had any physical defects?
- ◊ Whether he was under the care of a doctor?
- ◊ Taking any medication or drugs?
- What observations did you make of the defendant?
 - ◊ Speech?
 - ◊ Eyes?
 - ◊ Face?
 - ◊ Breath?
 - ◊ Balance?
- Based on your training and experience, what did the results of the preliminary exam mean to you?
- Did you rule out the possibility that the defendant was suffering from a medical problem? How?

4. Eye Examination

- Please explain to the jury what the fourth step of the evaluation is.
- HGN
 - ◊ What is HGN?
 - ◊ How is HGN performed?
 - ◊ Did you perform HGN on the defendant?
 - ◊ Who established HGN?
 - ◊ Are you certified to perform HGN?
 - ◊ How many times have you conducted HGN?
 - ◊ To remain qualified to administer HGN do you maintain HGN logs?

- ◇ What is your accuracy rating using the HGN test? (If you get an objection this demonstrates this officer reliably uses the HGN test & his/her testimony is, therefore, the product of reliable principles & methods – it goes to Rule 702 foundation.)
- ◇ Has the HGN test been the subject of scientific studies?[yes]
- ◇ Could you describe these[pre-try](studies include: 1975 Fort Lauderdale; 1977 California; 1981 California; 1995 Colorado; 1997 Florida; 1998 San Diego)
- ◇ Has the HGN test been found to be a reliable test for DUI investigations?
- ◇ Is the HGN test generally accepted to be an accurate and reliable? [Yes: US Dept. Of Transportation, International Association of Chiefs of Police, NHTSA, American Optometric Association, used in the medical field.]
- ◇ What things do you look for in the subject's eyes when HGN is being performed?

_____ Cannot smoothly follow moving object. What is a lack of smooth pursuit?

_____ Distinct and sustained nystagmus at Maximum deviation. How long do you hold his eye at the outer corner? (Approximately 4 seconds)

_____ Onset occurs before 45 degrees. What does it mean if onset is before 45 degrees?

- ◇ Could you describe HGN when influence by alcohol or drugs with HGN when not so influenced so the jury may better understand the concept of HGN [compare HGN to a windshield wiper on a dry windshield - the jerking motion of the wiper]
- ◇ Did you perform this exercise on the defendant?
- ◇ Which eye did you do first?
- ◇ How did the defendant's eyes react when you performed this field sobriety test?
- ◇ Based on your training and experience with HGN, what did the defendant's performance on the HGN mean to you?

- VGN
 - ◊ What is the second eye exam you conducted?
 - ◊ What is VGN?
 - ◊ How is it performed?
 - ◊ Did you perform VGN on the defendant?
 - ◊ What did you observe?
 - ◊ Based on your training and experience, what did this performance indicate to you?
 - ◊ Is the presence of VGN specific to certain drug categories? What about HGN?
 - ◊ [When VGN is present, it is a clue of influence of a high dose of alcohol, and/or some other DID drug, for that individual (Supporting studies: *Nystagmus Testing in Intoxicated Individuals*: Dr. Karl Citek et. al, November 2003; *Sleep Deprivation Does not Mimic Alcohol Intoxication on Field Sobriety Testing*: Dr. Karl Citek et. al, October, 2011.)]
 - ◊ Is what you saw consistent with (the drug found in the tox results).

- Lack of Convergence [Convergence Exam]
 - ◊ What is the third exam you performed?
 - ◊ What is the convergence test?
 - ◊ How is it performed?
 - ◊ Did you perform this test on the defendant?
 - ◊ What did you observe?
 - ◊ Based on your training and experience, what did this indicate to you?
 - ◊ Is what you saw consistent with (the drug found in the tox results).

5. Divided Attention Psycho-physical Tests

- Please describe the fifth step of the Drug Influence Evaluation.
- Are these exercises designed to test divided attention skills?
- What are divided attention skills?
- What do divided attention skills have to do with operating a car?
- Are these exercises used only in drug evaluations? [No]

- What are the divided attention tests that you performed on the defendant? [Romberg Balance, Walk and Turn, One Leg Stand, Finger to Nose]

- ASK ALL OF FOLLOWING QUESTIONS FOR EACH OF THE DIVIDED ATTENTION TESTS PERFORMED

- ⇒ What was the [first] test you administered to the defendant?
- ⇒ Did you instruct the defendant on how to properly perform this exercise?
- ⇒ Did you demonstrate this exercise? [Make sure this was done]
- ⇒ Would you please explain and demonstrate this exercise as you did for the defendant on that day in question? (Ask the officer ahead of time if he/she is comfortable demonstrating the SFSTs)
- ⇒ Did you fully explain and demonstrate the exercise to the defendant?
- ⇒ Did the defendant appear to understand you?
- ⇒ Did he appear to have any injuries that would prevent him from performing this exercise? (Do not need to ask this one every time)
- ⇒ What do DREs look for when the defendant is performing this exercise?

[Below are the qualifications for each exercise]

⇒ Romberg Balance

- * Body Tremors
- * Eyelid Tremors
- * Sways (distance and direction)
- * Muscle rigidity / flaccidity
- * Statements
- * Speech Patterns
- * Number of seconds estimated as 30

⇒ Walk and Turn

- * Keeps balance during the instruction phase
- * Starts too soon
- * Steps off line
- * Raises arms while walking
- * Misses heel to toe

- * Stops walking
- * Wrong numbers of steps
- * Improper turn
- * Body Tremors
- * Muscle rigidity / flaccidity
- * Statements
- * Speech patterns

⇒ One leg Stand

- * Raises arms
- * Sway
- * Hopping
- * Puts foot down
- * Standing still and straight during instructions
- * Body tremors
- * Muscle rigidity / flaccidity
- * Statements
- * Speech Patterns

⇒ Finger to Nose

- * Fingertip or pad of finger used to touch nose
- * Defendant misses nose and hits other parts of face
- * Sway
- * Body Tremors
- * Eyelid tremors
- * Abnormal muscle tone
- * Statements
- * Speech patterns

⇒ Did the defendant perform this test?

⇒ How did the defendant perform?

⇒ What clues in the exercise did the defendant miss?

⇒ How many clues are necessary to be considered a fail on this test?

- ⇒ Do you allow for nervousness?
- ⇒ What signs of impairment did the defendant exhibit?
- ⇒ Based on your training and experience, what did this indicate to you?
- ⇒ Is what you saw consistent with (the drug found in the tox results).

6. Vital Signs and Second Pulse

- Please describe the sixth step of the examination.
- What is the [first] vital sign that DREs check?

A. Pulse

- ◆ How do you check a subject's pulse rate?
- ◆ How do you know that they are feeling an artery rather than a vein?
- ◆ Do you have medical training to administer this evaluation as part of the DRE training? (only if has extra training)
- ◆ How often do DREs take a subject's pulse?
- ◆ Is there a normal range in which most people's pulse rates fall?
- ◆ What is the normal range? [60-90 beats per minute]
- ◆ Is this a medically acceptable range of normal?
- ◆ Did you take the defendant's pulse?
- ◆ How many times? [3]
- ◆ Did you use the same procedure you just described?
- ◆ What were the results?
- ◆ Based upon our training and experience, what if anything did this indicate to you?
- ◇ Is what you saw consistent with (the drug found in the tox results).

B. Blood Pressure

- ◆ What is blood pressure?
- ◆ What instrument do DREs use to measure blood pressure?
- ◆ What training do you have in the use of this instrument?
- ◆ How do you use this device?